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APPELLANT PRO SE:

**TIMOTHY WEAVER**  
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ATTORNEYS FOR APPELLEE:

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Deputy Attorney General  
Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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TIMOTHY WEAVER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 89A04-0603-PC-154
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

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APPEAL FROM THE WAYNE SUPERIOR COURT NO. 3  
The Honorable Darrin Dolehanty, Judge  
Cause No. 89D03-0509-PC-001

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**October 17, 2006**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**SULLIVAN, Judge**

Appellant, Timothy Weaver, appeals following the post-conviction court's summary disposition denying his petition for post-conviction relief. Upon appeal, Weaver claims the court erred in granting summary disposition in favor of the State and in denying his petition without an evidentiary hearing.

We affirm.

Following a jury trial, Weaver was convicted of possession of marijuana as a Class D felony<sup>1</sup> and was determined to be a habitual substance offender.<sup>2</sup> On March 17, 2004, the trial court sentenced Weaver to two and one-half years with the Department of Correction for the marijuana conviction enhanced by four and one-half years due to his status as a habitual substance offender, for a total sentence of seven years. Weaver appealed his marijuana conviction to our court, and a panel of our court affirmed his conviction in Weaver v. State, No. 89A01-0404-CR-159 (Ind. Ct. App. Dec. 21, 2004).

On September 27, 2005, Weaver filed a petition for post-conviction relief alleging ineffective assistance of both trial and appellate counsel in the above case. Weaver's petition alleged that "Appellate counsel failed to raise the issue regarding the illegality of the Habitual Substance Offender enhancement on appeal to the detriment of his client." App. at 7. With respect to trial counsel's alleged ineffective assistance, the petition further alleged that "Trial counsel failed to object to the Habitual Substance Offender enhancement, failed to file a motion to dismiss, failed to file an interlocutory appeal, all of which constitute deficient performance and said deficiencies resulted in prejudice to

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<sup>1</sup> Ind. Code § 35-48-4-11 (Burns Code Ed. Repl. 2004).

<sup>2</sup> Ind. Code § 35-50-2-10 (Burns Code Ed. Repl. 2004).

the Petitioner in the form of an additional loss of liberty by a period of 4 1/2 years.” App. at 7.

Following the State’s amended response to Weaver’s petition, the trial court determined the matter at issue was one of law. It therefore ordered the matter be submitted upon affidavit. Thereafter, on December 28, 2005, Weaver filed his motion for summary judgment, attaching a memorandum arguing that his trial and appellate counsel rendered ineffective assistance by failing to challenge the “double enhancement” of his conviction under both I.C. § 35-48-4-11, due to his previous conviction involving marijuana, and I.C. § 35-50-2-10, due to his having two prior unrelated substance abuse convictions. Weaver further alleged in his memorandum that appellate counsel rendered ineffective assistance by failing to argue that such “double enhancement” was a double jeopardy violation, and that trial counsel rendered ineffective assistance by failing to file a motion to suppress drug evidence used against him which was procured in violation of his Fourth Amendment rights and also by failing to seek independent experts to “assess the reliability of the State’s testing procedures.” App. at 43. Neither the double jeopardy claim, nor the Fourth Amendment claim, nor the independent expert claim was raised in Weaver’s petition for post-conviction relief.

In a February 9, 2006 summary disposition order, the post-conviction court denied Weaver’s petition on the basis that it was grounded in an inaccurate understanding of the law. In making its ruling, the post-conviction court referenced State v. Downey, 770 N.E.2d 794, 798 (Ind. 2002), in which our Supreme Court held that in a similar case where a defendant had appealed his “double enhancement” for possession of marijuana

under both I.C. §§ 35-48-4-11 (Class A misdemeanor elevated to Class D felony) and 35-50-2-10 (habitual substance offender), such “double enhancement” was permissible. Finding that Weaver’s petition was faulty as a matter of law, the court denied his motion for summary judgment and his petition for post-conviction relief, and it granted summary disposition in the matter in favor of the State. Weaver filed his notice of appeal of the summary disposition on February 28, 2006.

Weaver claims upon appeal that the post-conviction court erred by denying him a hearing and further, that the court erred on the merits in granting summary disposition in favor of the State.

A post-conviction court may summarily deny a petition for relief in cases where the pleadings and the record conclusively demonstrate that there is no genuine issue of material fact and the petitioner is not entitled to relief. Godby v. State, 809 N.E.2d 480, 482 (Ind. Ct. App. 2004) (citing Ind. Post-Conviction Rule 1(4)(f) and (g)), trans. denied. Where the post-conviction court is able to determine, after reading the petition and consulting the record, that there is no factual issue in dispute, a summary denial of a petition for post-conviction relief is proper. Id. The necessity of an evidentiary hearing is avoided when the pleadings show only issues of law. Id.

In this case the only allegations made by Weaver in his petition for post-conviction relief which were specifically denied by the State were whether his trial and appellate counsel rendered ineffective assistance by failing to challenge his “double enhancement.” Weaver’s post-conviction challenges were premised upon his claim that the alleged “double enhancement” was error as a matter of law, which Weaver argued in

his brief in support of his petition for post-conviction relief, as well as in his memorandum in support of his motion for summary judgment. Given the pleadings and Weaver's challenge based expressly upon a dispute of law, we conclude the post-conviction court did not err in issuing a ruling without a hearing, as there was no factual issue in dispute, and a hearing was therefore unnecessary to resolve the legal dispute at issue.<sup>3</sup>

Weaver further argues that the trial court's failure to grant him a hearing violated his procedural due process rights. First of all, the Indiana Post-Conviction Rules provide that a court shall hold an evidentiary hearing in cases where an issue of material fact is raised, but they do not require a court to hold a hearing before granting summary disposition in cases where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Post-Conviction Rule 1(4)(g). Further, even if the rules did guarantee Weaver the right to a hearing, he fails to indicate how the deprivation of such hearing affects his liberty interests. Indeed, "[T]he law is well-settled that state-created procedural rights do not, standing alone, constitute protected liberty interests." Maust v. Headley, 959 F.2d 644, 648 (7<sup>th</sup> Cir. 1992), cited in, Noland v. Wheatley, 835 F. Supp. 476, 487 (N.D. Ind. 1993). One does not have a life, liberty, or property interest in mere procedures because "[p]rocess is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a

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<sup>3</sup> We note that Weaver, in his October 31, 2005 Response to the State's Response in Opposition to Petitioner's Petition for Post-Conviction Relief, stated that there was no issue of material fact and further stated that he had no objection to proceeding by affidavit in the matter. Indeed, even in his motion for summary judgment, Weaver argued there was no genuine issue of material fact.

claim of entitlement. . . .” Id. (quoting Doe by Nelson v. Milwaukee County, 903 F.2d 499, 503 (7<sup>th</sup> Cir. 1990) (internal quotations omitted)).

Here, the denial of Weaver’s claims was based upon Downey, where the Supreme Court determined the “double enhancements” which served as the basis of Weaver’s post-conviction challenges were permissible, not impermissible as Weaver claimed. Weaver now argues that in being denied a hearing, he was deprived of the opportunity to introduce evidence. As an examination of any and all evidence was irrelevant to the resolution of the issue, the denial of a hearing and an opportunity to introduce such facts had no bearing whatsoever upon Weaver’s liberty. To be sure, even if all facts were introduced and construed in his favor, under Downey, discussed infra, the court must nevertheless have denied Weaver’s petition. Accordingly, we find no procedural due process violation in the court’s failure to hold a hearing.

As to the merits, we are mindful that in order to prevail upon a claim of ineffective assistance of counsel, Weaver must show that his trial and appellate counsel’s representation was both deficient, in that it fell below an objective standard of reasonableness, and that he was prejudiced by such deficiency so that he was denied a fair trial and appeal. See DeWhitt v. State, 829 N.E.2d 1055, 1065 (Ind. Ct. App. 2005), reh’g denied. To overcome the presumption that his trial counsel’s representation was appropriate, Weaver must present strong and convincing evidence. See id. To establish prejudice, Weaver must demonstrate that there is a reasonable probability that, but for his counsel’s performance, the result of the proceeding would have been different. See id.

Here, the post-conviction court granted summary disposition in favor of the State after determining that Weaver’s challenges were premised upon a misunderstanding of the law, specifically Downey, 770 N.E.2d at 798. In Downey, our Supreme Court concluded, with respect to a defendant charged with possession of marijuana under I.C. § 35-48-4-11 and determined to be a habitual offender under I.C. § 35-50-2-10, that such “double enhancement” was permissible. Upon examining the language of § 35-50-2-10 the court held, “By its specific inclusion of drug possession misdemeanors and felonies in the category of offenses that are subject to habitual substance offender enhancement, we find the Legislature intended to authorize such an enhancement notwithstanding the existence of the drug possession progressive penalty statute.” Downey, 770 N.E.2d at 798. In reaching its holding the court specifically distinguished Stanek v. State, 603 N.E.2d 152 (Ind. 1992); Freeman v. State, 658 N.E.2d 68 (Ind. 1995); Devore v. State, 657 N.E.2d 740 (Ind. 1995); and Ross v. State, 729 N.E.2d 113 (Ind. 2000), which Weaver now uses to support his position. We rely upon the Supreme Court’s reasoning in Downey and its distinction of those cases in rejecting Weaver’s argument.

Weaver’s claims of ineffective assistance of trial and appellate counsel are based upon the argument that his attorneys failed to challenge, in various forms,<sup>4</sup> his “double enhancement,” in spite of the Downey decision indicating such an enhancement was permissible. Given the clear authority of Downey, we find no justification to support the

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<sup>4</sup> Weaver’s petition for post-conviction relief alleges that appellate counsel failed to raise the “double enhancement” issue upon appeal, and that trial counsel failed to challenge the “double enhancement” by raising a proper objection, filing a motion to dismiss, or filing an interlocutory appeal. Weaver’s brief upon appeal claims only, with respect to trial counsel’s alleged failure to challenge the “double enhancement” that trial counsel failed to make a proper objection.

argument that either trial or appellate counsel rendered deficient representation of Weaver by failing to challenge his sentence on the grounds that it was doubly enhanced. Having found no deficient performance, we can further find no prejudice. Accordingly, we conclude the post-conviction court did not err in granting summary disposition in favor of the State regarding the question of whether trial and appellate counsel rendered ineffective assistance by failing to challenge Weaver's double enhancement.

Weaver further claims the post-conviction court erred in entering summary disposition in favor of the State because the double enhancement, which appellate counsel failed to challenge, is a violation of the prohibitions against double jeopardy and is therefore illegal. Weaver made no such objection in his petition for post-conviction relief. We need not entertain claims made upon appeal which were not originally raised in the post-conviction petition. See Ind. Post-Conviction Rule 1(8) ("All grounds for relief available to a petitioner under this rule must be raised in his original petition.") Although Weaver made this double jeopardy argument to the post-conviction court in his motion for summary judgment,<sup>5</sup> we note that, apart from the abstract of judgment indicating Weaver was found to be a habitual offender, Weaver apparently did not designate as evidence the information alleging habitual offender status or any other documents indicating the basis for the habitual offender enhancement. He has also failed to include them for our review upon appeal. As Weaver has failed to support his

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<sup>5</sup> We again note that while Weaver raised this issue for the first time in his summary judgment memorandum, he did not petition the court for a hearing. To be sure, he argued in his motion for summary judgment that there was no genuine issue of material fact and that he was entitled to judgment as a matter of law.



argument with adequate references to the record, we deem this argument waived. See Ind. Appellate Rule 46(A)(8)(a).

Similarly, with regard to Weaver's additional claims of ineffective assistance of trial counsel, specifically that trial counsel failed to investigate, failed to file a motion to suppress, and failed to seek independent experts, we note again that Weaver failed to include these arguments in his petition for post-conviction relief, which he was required to do. See Ind. Post-Conviction Rule 1(8). Although he made the arguments in his brief accompanying his motion for summary judgment, he failed to designate for the court those documents tending to support his claims on this issue, and he has failed to include them for our review upon appeal. Again, we deem these claims waived. See Ind. Appellate Rule 46(A)(8)(a).

In sum, upon our determination that Weaver's claims for post-conviction relief were demonstrably contrary to Indiana Supreme Court precedent, and that all other claims were either without merit or waived, we affirm the post-conviction court's summary disposition in favor of the State.

The judgment of the post-conviction court is affirmed.

BAKER, J., and MAY, J., concur.